INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutory Provisions Involved	3
Statement of the Case	5
Reason for granting the writ	8
Conclusion	15
Certificate of Service	16
Appendix A—Opinions and judgments below	A1

CITATIONS

Cases: Page

Owens v. *Washington*,
260 Ala. 198, 69 So. 2d, 694, at 201 9

Carter v. *East*,
220 Ala. 511, 125 So. 655 at 515 9

Kirkley v. *Green*,
273 Ala. 602, 143 So. 2d 454, at 604 9–10

Ex parte Western Railway of Alabama,
283 Ala. 6, 214 So. 2d, 284 at 12 10

Porter v. *Alabama Farm Bureau Mutual Casualty Ins. Co.*
279 Ala. 499, 187 So. 2d 254, at 507 10–11

Shelley v. *Kraemer*,
68 S. Ct. 836, 334 U.S. 1; 92 L. Ed. 1161; 3 ALR 2nd 441 .. 12

Jeffreys v. *Jeffreys*,
296 NYS 2d, 74; 58 Misc. 2d 1045 12

Sessions v. *State of Conn.*,
293 F. Supp. 834; Affirmed 404 F. 2d, 342 12

Braley v. *Gladden*,
402 F. 2d 858 12,13

State v. *Bates*,
22 Utah 75, 61 P. 905 13

Beacon Theatres v. *Westover*,
359 U.S. 500; 3 L. Ed. 2d 988; 79 S. Ct. 948 13

Hodges v. *Easton*,
106 U.S. 408; 27 L. Ed. 169; 1 S. Ct. 307 13–14

Commonwealth v. *Rowe*,
257 Mass. 172, 153 N.E. 537; 48 ALR 762 14

Morgan v. *Gay*,
19 Wall 81; 22 L. Ed. 100 14–15

Constitutional provisions and statutes:

Alabama Code, 1940, Title 7, Section 1112 3,8
Alabama Code, 1940, Title 7, Section 322 3,8
Alabama Code, 1940, Title 7, Section 323 4,8
Alabama Code, 1940, Title 7, Section 326 4,8
United States Code, Title 28, Section 1257(3) 5
United States Constitution, XIVth Amendment 2,4

In the Supreme Court of the United States

OCTOBER TERM, 1970

NO.

JAMES BUKACEK, PETITIONER

VS.

PELL CITY FARMS, INC., A CORPORATION; FITZHUGH A. BURTTRAM; CLARENCE B. KELLEY AND RAY WYATT, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

TO THE HONORABLES, THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES and THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, James Bukacek, respectfully prays that a Writ of Certiorari issue to review the Judgement and Opinion of the Supreme Court of Alabama, rendered on the 2nd day of July, 1970.

A timely application for rehearing in the Supreme Court of Alabama was denied, without opinion, on the 13th day of August, 1970.

OPINION BELOW

The opinion of the Supreme Court of Alabama has been reported at 237 So. 2d 851, under the title: *James Bukacek* vs. *Pell City Farms, Inc., et. al.*

A copy of this opinion is attached hereto in Appendix A. *infra* pp. A1 thru A6.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on the 2nd day of July, 1970, and is annexed hereto in Appendix A, *infra* p. A7.

A timely petition for rehearing was denied on the 13th day of August, 1970, and the judgement of the Supreme Court of Alabama thereon is in Appendix A, *infra*, p. A8, and this petition for certiorari was filed within ninety (90) days of that date.

This court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Does the denial of a trial by jury as granted by Title 7, Section 1112, Code of Alabama, deny petitioner a substantial right as guaranteed by the "Equal Protection of the Law" clause of Amendment XIV of the Constitution of the United States?

2. Does the denial of a trial by jury as granted by Title 7, Section 1112, Code of Alabama, deny petitioner a substantial right as guaranteed by the "Due Process of Law" clause of Amendment XIV of the Constitution of the United States?

3. Does the denial of a trial by jury as granted by Title 7, Section 1112, Code of Alabama, become academic because the Supreme Court of Alabama agreed with the decision of the trial judge or is such right to a trial by jury such a right that can never become academic because of the protection afforded a citizen by either the "equal protection of the law" clause or the "due process of law" clause of Amendment XIV of the Constitution of the United States?

STATUTORY PROVISIONS INVOLVED

Code of Alabama, Title 7, Section 1112:

> Upon the application of either party, in a proceeding under Section 1109 of this Title, a trial by jury shall be directed to determine the issues or any specific issue of fact presented by the pleadings; and the Court is bound by the result, but may, for sufficient reasons, order a new trial thereof; and when a trial is not requested, or as to the facts for which the same is not requested, the Court shall consider and determine any title, claim, interest or encumbrance, and shall, upon the finding of the jury, or upon such consideration and determination, finally adjudge and decree whether the defendent had any right, title or interest in, or encumbrance upon, such lands, or any part thereof, and what such right, title, interest or encumbrance is, and in or upon what part of the land, the same exist; and such decree is binding and conclusive upon all the parties to the suit.

Code of Alabama, Title 7, Section 322:

> In all proceedings as to equity matters, as to which proceedings either party may be entitled to a trial by jury, the case may be tried by a jury summoned for that purpose or by the regular juries for the week in which the trial is to be had, organized for the trial of cases in proceedings at law, or the judge presiding at the trial may order a special jury to be summoned, empaneled, and organized as special juries are provided for in trials of proceedings in civil cases at law. A change of venue of the trial in proceedings in equity matters may be had for good cause shown to the presiding Judge, as in other civil cases in the Circuit Court.

Code of Alabama, Title 7, Section 323:

> Such issue must be tried upon the like evidence as a suit at law, together with such parts of the Bills, answers, depositions, and other proceedings in the cause, as the Court may order; and the Court may also order the examination of the parties to the suit, allowing the other party to impeach or contradict such evidence.

Code of Alabama, Title 7, Section 326:

> In suits for partition of lands either by metes and bounds or by sale for division when the same cannot be equitably partitioned among the owners, if the defendent denies the title of the complainant or asserts an adverse claim or title in himself, the Circuit Judge need not dismiss the bill, but may direct the issue as to the title of the complainant, or as to such adverse claim or title of the defendent, to be tried as other issues of fact are triable, according to the three sections next preceding; if neither party to the suit demands a jury, the Circuit Judge shall try such issues as to the title of complainant, or as to such adverse claim or title of the defendent, together with the other facts or issues of the case.

United States Constitution Amendment XIV, Section 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without the due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

United States Code, Title 28, Section 1257(3):

> Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege, or immunity, especially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

The complainant's family purchased approximately 500 acres of land in St. Clair County, Alabama, beginning in about 1929 or 1930. Until after July 2, 1970, the date of the opinion of the Supreme Court of Alabama, the land has been assessed in the name of one of the Bukaceks and during all the time in question, James Bukacek, the petitioner, lived upon the land as his home and claimed homestead exemptions.

During 1964, James Bukacek suffered serious physical difficulties which resulted in an operation and extended confinement in his home—on the property in question. Financial difficulties followed and then domestic difficulties which resulted in a divorce at which time his ex-wife was awarded 180 acres of this property. During 1966 his money ran out and during the year 1967, he was financially embarrassed; he ate most of his food with his cousins and some of them brought food to his home.

During the latter part of 1967, the Bukacek farm, the property in question, was advertised for sale by the sheriff to satisfy

liens in the amount of $4,940.96. The sale was then continued until January 8, 1968. About November, 1967, James Bukacek went to the law firm of Burttram and Kelley, composed of Fitzhugh A. Burttram and Clarence B. Kelley, at a time when he (James Bukacek) was hungry, in difficult circumstances, and according to the testimony of Attorney Burttram, couldn't produce one dollar. His statement to Attorney Burttram was that he (James Bukacek) needed a partner to help him save "my farm." There were numerous negotiations which culminated in an agreement either on January 6 or January 7, 1968 the day prior to the scheduled sheriff's sale of the property to pay the liens.

There were three deeds: two dated January 6, 1968 and one dated January 8, 1968, conveying this property to a corporation which was neither *de facto* nor *de jure*. On that date, January 8, 1968, attorneys Fitzhugh A. Burttram and Clarence B. Kelley, paid off the liens at the sheriff's sale in the amount of $4,940.96. The corporate bank account was established on February 9, 1968. On February 9, 1968, the corporation, Pell City Farms, Inc., paid the Federal Land Bank payment and the three individuals received Federal Land Bank stock in the amount of $1,881.10 from Bukacek.

On March 7, 1968, an option which Mrs. Bukacek had given her ex-husband, petitioner, James Bukacek, was exercised whereby the 180 acres were restored to the original block making the approximate 500 acres, for and in consideration of petitioner conveying to his ex-wife a separate tract of 48 acres of land, the corporation paying her $1,050.00, and petitioner, James Bukacek, making an irrevocable will leaving everything to the two children of the parties, and a mortgage from the corporation.

On March 30, 1968, the Articles of Incorporation were filed in the Office of the Judge of Probate of St. Clair County, Alabama.

In May, 1968, it was agreed to offer the property for sale for not less than $250,000.00.

During the summer, petitioner, James Bukacek, found a partner who wanted to help him save his farm and he (petitioner), James Bukacek, offered the three individual respondents, thru attorney Fitzhugh A. Burttram a $6,000.00 profit to go no further since it was apparent they were not working to help him save his farm. Mr. Burttram testified that he considered the proposal and tried to be as courteous as possible but couldn't help but laugh about the ridiculousness of such a proposal.

Later, without the knowledge or consent of the petitioner, Fitzhugh A. Burttram, Clarence B. Kelley and Ray Wyatt negotiated a second mortgage on the land and home in question in the amount of $41,640.00 and a sale of all the property, including James Bukacek's home, for the sum of $145,000.00. When the petitioner, James Bukacek, accidently found out about this second mortgage and the sale, he reputiated the entire agreement, and, on the 23rd day of September, 1968, filed a statutory bill to quiet title.

As part of the original bill of complaint, the petitioner, James Bukacek, demanded a trial by jury pursuant tothe provisions of Title 7, Section 1112, Code of Alabama. In the opinion of the Supreme Court of Alabama, page A-2, the Court stated:

> Respondent's later made a motion to strike Bukacek's jury demand, claiming that the cross-bill raised issues and independent equities which were not triable by a jury as a matter of right, respondent's arguing that the provisions of Title 7, Section 1112 of the Code would not apply. The court granted the motion, struck the jury demand and tried the case without a jury.

At page A-7, in the opinion of the Supreme Court of Alabama, the court says:

> Appellant also claims that Title 7, Section 1112, grants

to him a right to a jury trial and that the trial court erred in striking his demand. Whether the trial court should have initially granted the trial by jury is now academic since we find the trial judge to have been correct in determining that the complainant was not entitled to relief on his statutory bill to quiet title.

REASON FOR GRANTING THE WRIT

In the opinion of the Supreme Court of Alabama, attached hereto in Appendix A, pp. A1 thru A6, the Court says that petitioner filed a statutory bill to quiet title as provided by Title 7, Section 1109, Code of Alabama.

At the time of the original filing of the Bill of Complaint, petitioner demanded a trial by jury. Later the respondents made a motion to strike the jury demand, claiming their cross-bill raised issues and independent equities which were not triable by a jury as a matter of right. The trial Judge entered an order striking the jury demand and tried the case without a jury.

Title 7, Section 1112, Code of Alabama, grants to either party, upon demand, the right to a trial by jury, and declares the Court to be bound by the results of the findings of the jury. The Court's judgment on those findings are binding and conclusive upon all the parties to the cause of action.

Title 7, Section 322, Code of Alabama, prescribes the method of assembling the jury where one is demanded in an equity case.

Title 7, Section 323, Code of Alabama, sets forth the manner of trial before a jury in an equity case to be similar to the trial of a case before a jury in a civil case.

Title 7, Section 326, Code of Alabama, grants a trial to a party, upon demand, in a suit to partition land. Section 326 and Section 1112 have been considered by our Courts as similar statutes.

The Supreme Court of Alabama has considered these statutes in several cases.

In *Owens* vs. *Washington*, 260 Ala. 198, 69 So. 2d, 694, the Supreme Court of Alabama, at page 201 says:

> By virtue of Title 7, Sections 322–326 Appellees as a matter of right were entitled to a jury trial. This Court, speaking through the late Mr. Justice Brown in *Howard* vs. *Ridgeway*, 225 Ala. 106, 142 So. 403, in defining what is meant by "an 'issue out of chancery' " said it was those equitable cases wherein the parties are entitled as a matter of right to a trial of the issues by a jury as distinguished from cases wherein the trial by jury and the verdict are merely advisory and that "In such cases the trial of the issues by jury partake of the essence of a trial at law."

In *Carter* vs. *East*, 220 Ala. 511, 125 So. 655 at page 515, the Supreme Court of Alabama, in discussing Section 6635–the previous number assigned to Section 326–says, at page 515:

> A trial by jury of the issue of title in partition proceedings, upon demand, is matter of right under Code, Section 6635.

In *Kirkley* vs. *Green*, 273 Ala. 602, 143 So. 2d 454, at page 604, the Supreme Court of Alabama says:

> The term "either party", as used in Sections 326, 1112, Title 7 of the Code, among others, means all of the parties complainant or respondent.* * *
>
> * * * * *
>
> We think the better rule is that where there is a demand by some of the complainants or respondents, the court should grant a jury trial to all. This would more nearly conform to our general tradition of the constitutional right to trial by jury, and at the same time

> avoid the anomaly of two separate trials upon an important issue of fact.

In the case of *ex parte Western Railway of Alabama*, 283 Ala. 6, 214 So. 2d. 284, at page 12, the Supreme Court of Alabama said:

> Ordinarily, the right to a jury trial is determined by the cause of action stated, rather than by the defenses interposed, and generally speaking whenever, in an action at law, a defense is interposed which raises a disputed question of fact, a jury trial is a matter of right.

This entire issue is reviewed in the case of *Porter* vs. *Alabama Farm Bureau Mutual Casualty Ins. Co.*, 279 Ala. 499, 187 So. 2d 254, beginning at page 507, wherein the Supreme Court of Alabama said:

> We come to insurer's contention that insured is not entitled to a jury because the purpose of the bill "is to obtain some recognized equitable relief, in addition to declaring a status."* * *
>
> * * * * *
>
> Insurer cites two cases to support this argument. The First case is *Miller* vs. *Hewell*, 271 Ala. 286, 123 So. 2d 126, in which the amended bill sought to have a deed declared a mortgage, to have an accounting to determine that the mortgage had been paid in full or to have the unpaid amount of the mortgage debt barred by the statute of limitation, to quiet title under Title 7, Sections 1109–1115, Code 1940, and also an aspect like a bill *quia timet* to cancel an instrument which appeared to convey a superior title. Complainants requested a jury under Section 1112, Title 7. On appeal, this court affirmed the denial of a jury under the rule which insurer seeks to apply in the instant case.
>
> In the other case, relied on by insurer, *Webb* v. *Bank of Brewton*, 265 Ala. 568, 93 So. 2d 154, in which com-

plainant sought to vacate and annul a mortgage, the trial court denied complainant's demand for a jury, which also was based on Section 1112, Title 7. This court said:

"It is apparent that the purpose of the bill is to invoke the right to apply Section 15, Title 20, Code, to the mortgage. The bill shows that without any statutory authority a court of equity has jurisdiction to set aside the mortgage as a cloud on complainant's title if it is subject to the option conferred by that statute. The allegations prescribed by Section 1110, Title 7, Code (to quiet title) were wholly unnecessary to confer jurisdiction and added nothing to the equity of the bill. When the purpose of the bill is to obtain some recognized equitable relief, in addition to declaring a status as provided in Sections 1109 and 1112, Title 7, Code, the right to a jury trial granted by Section 1112 does not apply."

* * * * *

It is apparent in the two cited cases that complainant asked for relief under Section 1112, Title 7, merely in an effort to obtain a right to a jury trial and that the real purpose of the bill in each case was to obtain recognized equitable relief as the court stated. That is not the situation here.

It will be readily seen from the foregoing authorities, that, once the Supreme Court of Alabama determines that the petitioner's action was a bill to quiet title, as set forth by Section 1109, Title 7, Code of Alabama, which it did in the opinion of July 2, 1970, then the petitioner was entitled, as a matter of right, to have a jury determine the issues in his trial.

1. The denial of the trial by jury by the trial court, denied the petitioner a substantial right as guaranteed by the "equal protection" clause of Amendment XIV of the Constitution of the United States.

This court stated in *Shelley* v. *Kraemer*, 68 S. Ct. 836; 334 U.S. 1; 92 L. Ed. 1161; 3 ALR 2nd 441, that the actions of state courts and of judicial officials in their official capacities are to be regarded as actions of the state within this amendment.

The court stated in *Jeffreys* v. *Jeffreys*, 296 NYS 2d. 74; 58 Misc. 2d 1045, that equal access to civil court is among the primary objectives of this amendment.

In *Sessions* v. *State of Conn.*, 293 F. Supp. 834; affirmed 404 F. 2d. 342, the court stated that this clause requires that if a procedure for hearing is established, it must be administered fairly and without discrimination.

In *Braley* v. *Gladden*, 402 F.2d 858, the Court said that if the departure from regular procedure in a state trial was of such significance that it denied petitioner a substantial right which the state guaranteed to others in his position, it cannot be countenanced.

It will be seen from the foregoing that a substantial right of petitioner was denied him in these proceedings. The "equal protection" clause affords citizens protection from unwarranted action of state court officials while acting in their official capacity.

By statute and judicial decision, the State of Alabama has established a procedure whereby an individual who files a bill to quiet title under Section 1109, Title 7, Code of Alabama, is then entitled to a trial by jury as a matter of right. When the trial court denied petitioner, James Bukacek, a trial by jury, petitioner was denied a substantial right which the State of Alabama had guaranteed others in his position.

This action of denying the trial by jury by the trial court is in opposition to and violates the "equal protection" clause of Amendment XIV of the United States Constitution.

2. The denial of the trial by jury by the trial court denied petitioner a substantial right as guaranteed by the "due process" clause of Amendment XIV of the United States Constitution.

In *Braley* v. *Gladden, supra,* the court stated that this clause guarantees to all a fair trial.

In *State* v. *Bates,* 22 Utah 65, 61 P. 905, the prisoner was tried by an eight man jury while the laws in effect at the time of the commission of the crime required a jury of twelve men. The court held the jury unlawful. Since the jury was unlawful, the decree was void.

In *Beacon Theatres* v. *Westover,* 359 U.S. 500; 3 L. Ed. 2d 988; 79 S. Ct. 948, petitioner sought a jury trial on the factual issues in a declaratory action. There were basically equitable issues but one of the parties could become liable for the treble damages under the anti-trust laws. In reversing the trial court and ordering the trial by jury, Mr. Justice Black said, at page 992:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Later in the decision the court stated:

> In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.

In *Hodges* v. *Easton,* 106 U.S. 408; 27 L. Ed. 169; 1 S. Ct. 307, part of the issues were presented to the jury and the court

decided part of the issues without the jury. In reversing the lower court, Mr. Justice Harlan, said, at page 171:

> * * *It was the province of the jury to pass upon the issues of fact, and it was the right of the defendants, secured by the Constitution of the United States, to have them do so. That right could have been waived, but it could not be taken from them by the court. * * *
>
> * * * * *
>
> It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver.

Petitioner, James Bukacek, complied with all the statutory provisions whereby he was entitled to a trial of the issues in these proceedings by a jury as a matter of right—he filed a bill to quiet title in the language set forth in the statute and demanded a trial by jury as required by the statutes.

Therefore, the denial of a trial by jury denied petitioner a substantial right as guaranteed by the "due process" clause of Amendment XIV of the United States Constition.

3. The Supreme Court of Alabama stated that the question of whether the trial court should have granted a trial by jury is now academic since the Supreme Court agrees with the decision of the lower court.

In *Commonwealth* v. *Rowe*, 257 Mass. 172, 153 N.E. 537; 48 ALR 762, the court held that the jury is a constituent part of the court and, where one is entitled to a trial by jury as a matter of right, the court has no jursidiction of the cause of action.

In *Morgan* v. *Gay*, 19 Wall 81; 22 L. Ed. 100, there was a suit on bills of exchange and the trial court decided the issues of fact without a jury. This court stated:

> * * *In the absence of such an agreement, [to waive a jury trial] and of the defendant's counsel, it was not competent for the court to try the issue without the intervention of a jury.

In view of the foregoing, since petitioner was entitled to a trial by jury as a matter of right, the court did not have jurisdiction of the matter because the jury was a constituent part of the court. Also, the court was not competent to determine the issues of fact without the jury.

It will be noted in the opinion of the Supreme Court of Alabama that the trial court's determination of a disputed factual issue—whether or not there was peaceable possession on the part of the petitioner—that determined the decision in the case.

Without a jury, since petitioner was entitled to a jury as a matter of right, the trial court was not competent to determine those issues and the trial court never had jurisdiction of the cause of action.

This right to a trial by jury in this cause is such a substantial right protected by Amendment XIV of the United States Constitution that the denial of the right can never become academic.

CONCLUSION

It is the contention of petitioner, James Bukaeek, that he filed a statutory bill to quiet title; that he properly demanded a trial by jury; that he was entitled to a trial by jury as a matter of right; that the denial of the trial by jury by the trial court denied petitioner a substantial right as guaranteed by the "Equal Protection" and "Due Process" clauses of Amendment XIV of the Constitution of the United States.

Petitioner further contends that, since he was entitled to a trial by jury as a matter of right, the jury was a constituent part

of the court, and, without the jury, the court did not have jurisdiction of the cause of action; the court was not competent to try the issues of fact; and the decree rendered by the court without the jury was void.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Alabama.

Respectfully submitted,

NICHOLSON, FORSTMAN
& FERNANDEZ

By_____
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 1970, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Dozier Williams, Esquire, 2121 Building, Birmingham, Alabama; and three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Embry and Robinson, Pell City, Alabama, counsel for the respondents. I further certify that all parties required to be served have been served.

_____
Counsel for Petitioner
NICHOLSON, FORSTMAN
& FERNANDEZ
216 Brown Marx Building
Birmingham, Alabama 35203

A1

STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1969-70

James Bukacek

7 Div. 858

v.

Pell City Farms, Inc., *et al*

Appeal from St. Clair Circuit Court, In Equity

MADDOX, JUSTICE

This is an appeal by complainant from a final decree granting the relief prayed for by the respondents in their cross-bill.

Complainant (appellant) James Bukacek filed a statutory bill to quiet title (Title 7, § 1109, *et seq.*, Code of Alabama, 1940) against the respondents (appellees) Pell City Farms, Inc., a corporation, and Fitzhugh A. Burttram, Clarence B. Kelly and Ray Wyatt. Appellant, in his amended bill, tracked out statute and alleged that he was in peaceable possession of the land, that he owned the land and that the respondents claimed, or were reputed to claim, some right, title or interest in, or lien or incumbrance on the land.

Complainant called upon the respondents to set forth and specify their title, claim, interest in, or incumbrance on the land and by what instrument the same was derived and created.

Respondents asked for and received a temporary injunction prohibiting Bukacek from committing waste and from going onto the property and then filed an answer and cross-bill alleging that Pell City Farms, Inc., was the owner of the lands described in the complaint in fee simple, free and clear of all liens

except certain mortgages held by mortgagees. Respondents specifically denied that Bukacek was in "peaceable possession." The respondents also asked that the corporation be declared the owner of the lands in question and prayed that the temporary injunction against Bukacek be made permanent.

Respondents later made a motion to strike Bukacek's jury demand, claiming that the cross-bill raised issues and independent equities which were not triable by a jury as a matter of right, the respondents arguing that the provisions of Title 7, § 1112 of the Code would not apply. The court granted the motion, struck the jury demand, and tried the case without a jury.

Upon final submission the trial court dismissed Bukacek's complaint, as amended, and decreed that "The title to said property as described in the Cross-Bill of Respondents be and is vested in the Respondents and all title, right or claim of complainant be and is divested out of him."

Bukacek says the trial court erred in granting the relief prayed for by the respondents and in striking his demand for a jury trial. He also complains of the trial court's action in the admission of certain evidence.

The essential facts are not seriously disputed. The land involved is approximately 480 acres in two tracts one 300-acre tract owned by James Bukacek and one 180-acre tract owned by Virginia Bukacek, ex-wife of James Bukacek, both located in St. Clair County. In 1964, Bukacek had difficulties with his health, forcing him in 1965 to sell the dairy business he was operating. He also was having domestic problems which culminated in a divorce.

Matters got progressively worse for Bukacek, and in the latter part of 1966 and in 1967, he was having serious financial problems. The sheriff was advertising his farm for sale to pay three judgments and costs of court. The State of Alabama held a tax claim of approximately $15,000, and a payment on a Federal

Land Bank mortgage was due. Bukacek was unable to exercise an option he held to buy the 180-acre tract owned by Virginia Bukacek. In other words, Bukacek was in serious financial difficulties. It was at this time that Bukacek went to see appellee Fitzhugh Burttram about saving "my farm."

In January, 1968, James Bukacek and the three individual respondents, Fitzhugh Burttram, Clarence B. Kelly and Ray Wyatt, entered an agreement whereby Pell City Farms, Inc., was formed. Pursuant to the agreement, Bukacek conveyed his 300-acre tract to Pell City Farms, Inc., and the corporation eventually exercised the option held by James Bukacek, and assigned to the corporation, to purchase the 180-acre tract from Virginia Bukacek. The respondents paid the judgments, the property taxes, the mortgage payment, and the corporation and the individual respondents personally assumed the $37,600 mortgage and an additional mortgage executed to complete the purchase of the 180-acre tract and pay the $15,000 state taxes (for which respondents had negotiated an extension).

One of the complainant's principal arguments here is that Pell City Farms, Inc., grantee under the deeds executed by James Bukacek and his ex-wife, Virginia Bukacek, was incapable of taking legal title because the Articles of Incorporation were not filed with the Judge of Probate as required by Title 10, § 21(11), Code of Alabama, 1940 (Recompiled, 1958). Complainant argues that prior to the filing of the Articles of Incorporation, Pell City Farms, Inc., was neither a *de jure* nor a *de facto* corporation, and therefore was incapable of taking title to the real property. Complainant's argument, while very persuasive, under the facts of this case is not convincing. The evidence clearly shows that Bukacek was one of the incorporators of Pell City Farms, Inc., that he was an officer, director, and stockholder, and that he executed the deed transferring his interest in the land to the corporation; and that he participated in the business activities of the corporation relating to the land after the Articles of Incorporation were filed in the office of the Judge of Probate on March 30, 1968.

Complainant cites no Alabama case which supports his argument. He does cite cases from other jurisdictions which hold that if the Articles of Incorporation are not filed, the corporation does not exist.

Our examination of decisions from other jurisdictions shows that the courts are not in agreement as to whether a corporation *de facto* may be created notwithstanding failure to file the articles of incorporation as required by statute. The broad view is that the failure to file the required papers prevents the organization from becoming a corporation, and in the absence of any filing of the articles of incorporation there is neither a charter nor a colorable attempt to obtain one. 18 Am. Jur. 2d, Corporations, § 74.

Assuming, without deciding, that we would subscribe to the broad view that no corporation was here formed prior to the filing of the Articles of Incorporation, we think the fact situation here presented shows that while Pell City Farms, Inc., may not have been a corporation *de jure* – or perhaps even *de facto* – insofar as the transaction here is concerned, it should be regarded practically as a corporation, being recognized as such by the parties themselves. In other words, the incidents of corporate existence may exist as between the parties by virtue of an estoppel. Thus, besides corporations *de jure* and *de facto*, there can be a recognition of a third class known as "Corporations by estoppel." Corporations by estoppel are not based upon the same principles as corporations *de facto*. The doctrine of *de facto* corporations has nothing to do with the principle of estoppel. In fact, a corporation *de facto* cannot be created by estoppel, the only effect of an estoppel being to prevent the raising of the question of the existence of a corporation.

Bukacek was one of the incorporators, he dealt with the corporation as a corporation both before and after the Articles of Incorporation were filed. Under such facts, Bukacek is estopped to deny the existence of the corporation at the time he

voluntarily executed a deed transferring property to the corporation even though the Articles of Incorporation had not been filed at that time.

Our ruling here is limited. It is based on equitable grounds which preclude the complainant here from denying corporate existence. As against the state, of course, a corporation cannot be created by agreement of the parties—the statutes make certain prerequisites—but as between themselves and in connection with their own private litigations as here involved they may, by their agreements or their conduct estop themselves from denying the fact of the existence of the corporation. We hold, therefore, that Bukacek is estopped to deny the existence of Pell City Farms, Inc., even though it may have been neither *de facto* nor *de jure* at the time he executed the deed making the corporation, *by its corporate name*, the grantee.

Appellant also claims that Title 7, § 1112, grants to him a right to a jury trial and that the trial court erred in striking his demand. Whether the trial court should have initially granted the trial by jury is now academic since we find the trial judge to have been correct in determining that the complainant was not entitled to relief on his statutory bill to quiet title.

The evidence clearly shows that the complainant here was not in "peaceable possession" as those terms are defined in our decisions. This court has repeatedly held that in order to maintain the statutory proceeding to quiet title the proof must show a peaceable possession in the complainant as distinguished from a contested, disputed or scrambling one. 16 Ala. Dig., Quieting Title, Key No. 12(9).

The evidence in this case shows affirmatively that the complainant was not in peaceable possession, and the trial court properly denied any relief to the complainant on his statutory proceeding. Having decided that, we now face the question of whether the trial court should have granted relief to the respondents on their cross-bill. We hold that the court did not commit error in this regard.

In *Chestang* v. *Tensaw Land & Timber Co.*, 273 Ala. 8, 134 So. 2d 159 (1961), we have discussed very thoroughly the power of an equity court to quiet title in the respondent when the complainant fails to make proof of peaceable possession and the proof shows the respondent has the better title and has peaceable possession. We could extend this opinion and fully discuss this point, but to do so would merely mean a restatement of the law as so ably set forth in *Chestang, supra*. We, therefore, hold the trial court did not commit error in granting the relief requested by the respondents in their cross-bill.

We have considered complainant's assignments of error 5 and 6, which deal with the admission of evidence. We have carefully reviewed the objections made and find no prejudicial error with regard to these two assignments of error.

We note that the decree of the trial court reads:

> "2. The title to said property as described in the Cross-Bill of Respondents be and is vested in the Respondents and all title, right or claim of Complainant be and is divested out of him." (Emphasis ours)

We assume the trial court intended to vest title in Pell City Farms, Inc., as prayed for by the respondents in their cross-bill. In order that the decree read properly, we hereby modify it by striking that portion of the decree above quoted and substitute in lieu thereof the following:

> "2. The title to said property as described in the Cross-Bill of Respondents be and is vested in Pell City Farms, Inc., and all title, right or claim of Complainant be and is divested out of him."

Except for the slight modification of the decree, the judgment of the trial court is due to be affirmed.

DECREE MODIFIED AND, AS MODIFIED, AFFIRMED.

Livingston, C. J., Lawson, Merrill, and Harwood, J. J. concur.

STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

SPECIAL TERM 1970

7th Division 858	*	
JAMES BUKACEK	*	
vs.	*	ST. CLAIR CIRCUIT COURT IN EQUITY
PELL CITY FARMS, INC., A CORPORATION, *et al*	*	

Come the parties by attorneys, and the record and matters therein assigned for errors being argued and submitted and duly examined and understood by the Court, it is considered that the final decree of the Circuit Court should be modified as is hereinafter done and as modified, there is no error.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Paragraph 2 of the final decree be stricken and that in lieu thereof, the following shall be substituted:

> "2. The title to said property as described in the cross-bill of respondents be and is vested in Pell City Farms, Inc., and all title, right or claim of the complainant be and is divested out of him."

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the decree of the Circuit Court as modified be and the same is hereby affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the appellant, James Bukacek, and James T. Forstman and G. W. Nicholson, the sureties on the appeal bond, pay the costs of appeal in this Court and in the Court below.

And it appearing that said parties have waived their rights of exemption under the laws of Alabama, it is ordered that execution issue accordingly.

STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

SPECIAL TERM 1970

7th Division 858	*	
James Bukacek	*	
vs.	*	ST. CLAIR CIRCUIT COURT IN EQUITY
Pell City Farms, Inc., *et al*	*	

IT IS ORDERED that the application for rehearing filed in this cause on July 17, 1970, is hereby overruled.

SUPREME COURT, U.S.
FILED
DEC 31 1970
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO. 956

JAMES BUKACEK,

Petitioner

vs.

PELL CITY FARMS, INC., a corporation, FITZHUGH A. BURTTRAM; CLARENCE B. KELLY; and RAY WYATT,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENTS IN OPPOSITION

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Counsel for Respondents

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 956

JAMES BUKACEK,

Petitioner

vs.

PELL CITY FARMS, INC., etc., et al.,

Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This brief of respondents is filed in opposition to a Petition for Writ of Certiorari to the Supreme Court of Alabama. The respondents respectfully submit that the petitioner has failed utterly in his petition to indicate in any manner wherein he raised a federal question in the courts below. Rule 23 (f), Rules of the Supreme Court of the United States, July 1, 1970.

Furthermore, even if it may be assumed that a federal constitutional question was raised, petitioner has omitted further in his petition to show wherein the Supreme Court of Alabama passed upon such federal question, or did not rest its decision denying the statutory right of trial by jury in this case upon completely adequate non-federal grounds.

QUESTIONS PRESENTED

Petitioner has presented three questions.

It is submitted these three questions can be consolidated and stated as follows:

1. Whether the Supreme Court of Alabama erred in its decision that petitioner was not entitled to a jury trial under Title 7, Section 1112, Code of Alabama, 1940 (Recompiled 1958), in contravention of the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

In addition to the constitutional provisions, statutes and rules set forth in the Petition for Writ of Certiorari, pp. 3 through 5, respondents would invite the attention of the Court to Rule 23(f), Rules of the Supreme Court of the United States, July 1, 1970:

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereof, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.***"

STATEMENT OF THE CASE

The Statement of the Case appearing in the Petition for Writ of Certiorari is substantially correct as to the events that occurred. Incorrect details are not pertinent.

However, respondents do not perceive in the Statement of the Case, or thereafter, any elucidation wherein he raised any federal question of a denial of a jury trial either in the trial court or in the Alabama appellate court.

The attention of this Court is respectfully invited to the following excerpt from the opinion of the Supreme Court of Alabama:

> "Appellant also claims that Title 7, § 1112, grants to him a right to a jury trial and that the trial court erred in striking his demand. Whether the trial court should have initially granted the trial by jury is now academic since we find the trial judge to have been correct in determining that the complainant was not entitled to relief on his statutory bill to quiet title.
>
> "The evidence clearly shows that the complainant here was not in 'peaceable possession' as those terms are defined in our decisions. This court has repeatedly held that in order to maintain the statutory proceedings to quiet title the proof must show a peaceable possession in the complainant as distinguished from a contested, disputed or scrambling one. 16 Ala. Dig., Quieting Title, Key No. 12(9).
>
> "The evidence in this case shows affirmatively that the complainant was not in peaceable possession, and the trial court properly denied any relief to the complainant on his statutory proceeding. Having decided that, we now face the question of whether the trial court should have granted relief to the respondents on their cross-bill. We hold the court did not commit error in this regard."

This, in its entirety, is what the Supreme Court of Alabama had to say about the jury trial issue. No federal ground is mentioned, and, in fact, the court stated petitioner did not qualify or have standing to prosecute a statutory quiet title action since his possession was not peaceable!

ARGUMENT

I.

No Federal Question is Presented

Petitioner has not enlightened this Court wherein any title, right, privilege, or immunity under federal law was asserted affirmatively or defensively in the lower state tribunals, nor did the decision of the Supreme Court of Alabama pass upon any federal question.

This is a civil case commenced in the lower court of Alabama under a special statutory equitable action to quiet title. As a matter of statutory grace, and not of constitutional right, should a complainant be in actual peaceable possession of land, then he is entitled to ask for a trial by jury under the provisions of Title 7, Section 1112, Code of Alabama, 1940.

Respondents here in the lower trial court moved that court to strike the jury demand of the petitioner here, which motion was granted, and the lower trial court proceeded to hear and determine the case without a jury. It does not appear in the record that at that point the petitioner asserted any federal constitutional right to a trial by jury. This was his first opportunity to do so; this he failed to do.

Neither does it appear that in the Supreme Court of Alabama that petitioner asserted any federal constitutional right concerning the striking of his jury demand.

The Supreme Court of Alabama in its decision and opinion does not refer to any federal constitutional right; its decision quite simply says that under the circumstances of this case that petitioner was not entitled to the *statutory* right of trial by jury, such jury being provided in Title 7, Section 1112, Code of Alabama, 1940.

The decision of the Supreme Court of Alabama does no more than discuss the interpretation of this Alabama statute, without considering such interpretation in the light of a federal question properly presented to it. Thus, if it be assumed that a federal question was properly presented to

the Supreme Court of Alabama, this Court is still without jurisdiction to consider the federal points. *Beck v. Washington*, 369 U.S. 541, 549–550.

Finally, and granting to petitioner every benefit of the doubt, he has not demonstrated that the denial to him of the statutory right of trial by jury in quiet title cases was a departure from accepted Alabama procedure where he could not prove his "peaceable possession". In this posture of the matter, there could be absolutely no basis for claiming a denial of "equal protection of the laws", and, it is submitted, the decision of the Supreme Court of Alabama was based upon an entirely adequate non-federal ground. See *Herb v. Pitcairn*, 324 U.S. 117, 125–6.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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December 11, 1970